IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 6, 2006

RONALD K. PENDERGRAPH v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Van Buren County
No. 1758F Larry B. Stanley, Jr., Judge

No. M2005-00712-CCA-R3-PC - Filed October 3, 2006

The petitioner, Ronald K. Pendergraph, appeals the post-conviction court's denial of his request for post-conviction relief. On appeal, he argues that: (1) he was denied a full and fair hearing on his petition, (2) he was denied the effective assistance of counsel and entered an involuntary and unknowing plea, and (3) the state improperly breached the terms of the original plea agreement. Upon our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES, J., joined. GARY R. WADE, P.J., not participating.

Ronald K. Pendergraph, Pro Se, Pikeville, Tennessee.

Paul G. Summers, Attorney General and Reporter; Sophia Lee, Assistant Attorney General; Dale Potter, District Attorney General; and Larry Bryant, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL BACKGROUND

From the record, we glean the underlying facts of this case. The petitioner was stopped for speeding on January 8, 2002. Upon pulling the petitioner over, the police officer determined that the petitioner's license was "revoked with a habitual traffic offender status," and he was under the influence of alcohol. The petitioner was charged with one count of violating Habitual Traffic Offender "HTO" status and 4th offense Driving Under the Influence "DUI." On June 2, 2003, the petitioner pled guilty to violation of HTO status and received a four year sentence as a Range III, Persistent Offender. His DUI charge was dismissed.

On October 21, 2003, the petitioner filed a pro se petition for post-conviction relief and an evidentiary hearing was held on January 24, 2005.[1] At the hearing, appointed counsel[2] testified that he was appointed to represent the petitioner in his 4th offense DUI and habitual traffic offender case. Appointed counsel stated that the petitioner told him that he was trying to retain another attorney, and the other attorney contacted counsel and they discussed the petitioner's case "two (2) or three (3) or four (4) times." Appointed counsel said that retained counsel told him that he was limiting his representation and "wasn't taking the case on fully at that time."

In response to questioning regarding an offer made in General Sessions Court, appointed counsel stated, "I wouldn't consider it an offer. . . . The way I recall it is that [the prosecutor] said this is what we generally offer on this type of case. . . . I did not consider that a firm offer because I know that they didn't make offers [in General Sessions]." Appointed counsel said that he did not remember what the alleged offer was, but he and the prosecutor, and the petitioner and his wife were present. Appointed counsel stated that the petitioner's case was bound over to the grand jury without a preliminary hearing. Appointed counsel recalled that after arraignment the state made the petitioner an offer, but the petitioner felt that the offer was too high and wanted the previous "offer." Appointed counsel was sure he discussed with the prosecutor that the petitioner was not satisfied with the offer, but he could not remember whether they discussed the alleged General Sessions offer.

Appointed counsel recalled that the petitioner's case was the second case set for trial on June 2, 2003, and he admitted that he had not done a whole lot of preparation because the petitioner had told him that "[retained counsel] was his attorney." Appointed counsel stated, however, that retained counsel notified him about a week before the trial date that he could not be at trial, so appointed counsel discussed with the petitioner about how to proceed. Appointed counsel testified that on the day of trial, he, the petitioner, and the prosecutor met and discussed potential offers. Appointed counsel said that at some point during the discussions the petitioner decided to take an offer and went to the courtroom and entered his plea. Appointed counsel testified that if the petitioner had not taken the offer there was plenty of time before the new trial date to straighten the matter out with retained counsel, and no one "forced [the petitioner] to do anything that day."

On cross-examination, appointed counsel pointed out that under the terms of the plea agreement the petitioner's DUI charge was dismissed and he was sentenced as a persistent offender, rather than the DUI running concurrent and the petitioner being sentenced as a career offender as was previously offered. Appointed counsel stated that he was familiar with the habitual traffic offender law and noted that it was a technical violation that did not require a lot of proof and preparation for trial. As such, appointed counsel stated, "[o]n the HTO, you either are or you aren't." Appointed

---

[1] The petitioner was appointed counsel on two different occasions following the filing of his pro se petition. However, both counsels were allowed to withdraw due to the petitioner's dissatisfaction with their respective representation, and the petitioner proceeded pro se.

[2] As the testimony will reveal, the petitioner unofficially had two counsels at the lower level – one appointed, one retained. For clarity, we will differentiate between the two by using the references, "appointed counsel" and "retained counsel."

counsel said that the petitioner's only viable defense would have been to challenge the legitimacy of the stop for speeding.

Appointed counsel testified that he never received an order substituting counsel from retained counsel. Appointed counsel also noted that neither the prosecutor's office nor the court were notified that retained counsel was taking over as the petitioner's attorney. Appointed counsel said he was present when the petitioner entered his guilty plea and he had never knowingly allowed a defendant to enter a plea that was not voluntary. Appointed counsel lastly testified that the petitioner was familiar with the criminal justice system, and he seemed satisfied with the plea after the prosecutor agreed to dismiss the DUI.

Tabitha Pendergraph, the petitioner's ex-wife, testified that she was present in General Sessions Court when the offer was made to the petitioner. However, Ms. Pendergraph stated she did not recall the conversation concerning the offer. Ms. Pendergraph read a letter she had written that said, "I believe in my heart that everything will be okay. I think he will do what he said he would." She then read a second letter that said, " I can't believe that Little Weasel changed what he said."

Ms. Pendergraph said that retained counsel was never the petitioner's lawyer. She testified that she went to see retained counsel, and he returned the retainer fee, saying he was not going to represent the petitioner. Ms. Pendergraph stated that this visit with retained counsel occurred after the petitioner's first court date, and the petitioner knew retained counsel was not representing him.

Myrtle Hawkins, the petitioner's aunt, testified that she paid retained counsel the fee to represent the petitioner. Ms. Hawkins explained that she first gave Ms. Pendergraph $1,000.00 to pay retained counsel, and Ms. Pendergraph used the money to buy groceries. Ms. Hawkins explained that she then paid retained counsel $2,000.00 more. She said that she was never informed that retained counsel was not going to represent the petitioner.

Ms. Hawkins testified that she spoke with appointed counsel, and he told her that the prosecutor's offer was worse than expected, but he would not tell her the terms of the offer. She recalled that appointed counsel told her that the prosecutor was "going against" a deal of "six (6) months and the rest of his probation."

The petitioner testified that his family hired "retained counsel" shortly after appointed counsel was appointed to represent him. However, the petitioner stated that he talked to appointed counsel a few times and had asked him to try to get the case taken care of in General Sessions Court because a man he knew had recently pled guilty to HTO and received only ninety days. The petitioner recalled that on January 31, 2002, he met with appointed counsel and the prosecutor, and appointed counsel told him that he thought he had an offer worked out where he would get a sentence of split confinement, serve six months and the remainder on probation, in exchange for waiving his preliminary hearing. The petitioner stated that he would not have waived his preliminary hearing had he known the deal was going to be revoked because "if [he] had had a preliminary hearing, [he] may not have even been indicted because [he] was arrested in Warren County by a Van

Buren County officer." When asked by the court if he wanted a trial, the petitioner stated that he did not want a trial, he wanted the original plea, but he would take a new trial if he had to.

The petitioner testified that he eventually took an offer because appointed counsel told him that he was not prepared to go to trial because it had been almost a year since they had last talked. The petitioner said that appointed counsel tried to postpone the trial date, but the trial court found that eighteen months was ample time to prepare for trial. The petitioner further testified that he met with appointed counsel and the prosecutor the day of his trial, and the prosecutor told him that he had to take the offer or go to trial. The petitioner claimed that the trial court sensed something was wrong with him as he entered his plea because the court inquired, "why are you hesitating?" The petitioner lastly claimed that he knew two individuals charged with similar offenses who received less time than he did.

On cross-examination, the petitioner stated that he understood he would not be entitled to a new plea offer if the court set aside his guilty plea and reinstated the indictment. He also said that he understood, if convicted, he faced a potential sentence of six years as a career offender on the HTO charge and eleven months, twenty-nine days on the DUI charge. The petitioner did not deny that he was guilty of driving on a revoked license and drinking and driving. The petitioner testified that he talked to both appointed and retained counsel about the fact the police officer was out of his jurisdiction when he was pulled over. The petitioner further said that he was in shock when he pled guilty "because of the way you all [were] acting just to convict me for driving with no driver's license, and hiring a professional lawyer to represent me, and him take my money, and then not show up in Court." The petitioner admitted that at the time he entered his plea he told the court he was doing so freely and voluntarily.

On re-direct examination, the petitioner claimed that retained counsel represented him at a parole hearing and told the hearing officer that he was taking the petitioner to trial on June 2, 2003 where he would hopefully be found not guilty.

The state recalled appointed counsel who testified that the petitioner never told him that he was not in Van Buren County when he was pulled over, though appointed counsel recalled some conversation about the slim possibility that the arresting officer did not see him speeding in Van Buren County. Appointed counsel pointed out, however, that no one else was present when the petitioner was stopped.

The state called the prosecutor who was involved in this matter. The prosecutor testified that the district attorney's office typically did not make an offer in General Sessions Court if the offense was a felony. The prosecutor explained that the reason for the practice was because they did not know what range the offender would be in at that point. The prosecutor stated that he did not recall what he said to the petitioner in General Sessions, but he did not think he made an offer of three years suspended after serving six months because he would not have known the petitioner's offender status at that time.

The petitioner took the stand again and testified that his brother picked his vehicle up after he was arrested and could attest that the stop took place in Warren County.

Following the hearing, the post-conviction court entered an order denying the petitioner's request for post-conviction relief.

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

ANALYSIS

Full and Fair Hearing

The petitioner first argues that he did not receive a full and fair post-conviction hearing. In this regard, the petitioner specifically alleges that: (1) the post-conviction court improperly limited the introduction of hearsay testimony; (2) post-conviction counsel had numerous "shortcomings" in his representation; (3) neither post-conviction counsel nor the post-conviction court inquired into whether his plea was knowingly and voluntarily given; (4) retained counsel's involvement was not thoroughly addressed, and (5) the post-conviction court abruptly ended the hearing.

First, the petitioner argues that the post-conviction court improperly rejected his aunt's hearsay testimony.[3] He contends that his aunt should have been allowed to testify as to what the petitioner's wife told her about the terms of the General Sessions "offer" after his wife testified that she could not remember the offer. The petitioner cites to Rule 804(a)(3) of the Tennessee Rules of Evidence as support for this argument. Rule 804(a)(3) says that a declarant is unavailable as a witness if the declarant demonstrates a lack of memory of the subject matter of the declarant's statement. While it is true, the petitioner's wife demonstrated a lack of memory and was therefore "unavailable," the aunt's statement is hearsay and Rule 804 does not allow for the admission of all hearsay. Rule 804(b) lists the particular types of hearsay that are admissible when it is determined that a witness is unavailable. The 804(b) hearsay exceptions include former *testimony*; statements under belief of impending death; statements against interest; statements of personal or family history, such as marriages and divorces; and forfeiture by wrongdoing. Informal personal conversations do

[3] In its appellate brief, the state addressed the issue of the petitioner's mother's hearsay testimony. However, as the petitioner argues and the record reflects, it is hearsay testimony from the petitioner's aunt that is at issue.

not fall under any of these declarant unavailable exceptions to the rule against hearsay. *See* Tenn. R. Evid. 804. The petitioner is not entitled to relief on this issue.

Second, the petitioner alleges that post-conviction counsel had numerous "shortcomings" in his representation. It is well-established that a petitioner does not have a constitutional right to be represented by counsel in a post-conviction case. *See House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Because there is no constitutional right to counsel in post-conviction proceedings, our supreme court has held that "there is no constitutional right to effective assistance of counsel in post-conviction proceedings." *Id.* As a result, Tennessee courts have long adhered to the rule that a claim of ineffective assistance of counsel in a post-conviction proceeding is not cognizable as a basis for relief. *House*, 911 S.W.2d at 712.

While due process does not require the appointment of counsel in post-conviction proceedings, however, the legislature has afforded a statutory right to counsel. *See* Tenn. Code Ann. § 40-30-107(b)(1). The appointment of post-conviction counsel ensures "that a petitioner asserts all available grounds for relief and fully and fairly litigates these grounds in a single post-conviction proceeding." *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 2000). Our supreme court has provided that a post-conviction attorney is required to review the pro se petition, file an amended petition asserting other claims which the petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including the petitioner and prior counsel, and diligently investigate and present all reasonable claims. *See* Tenn. Sup. Ct. R. 28, § 6(C)(2); *Leslie*, 36 S.W.3d at 38. Counsel must also to file a certification indicating that he has thoroughly investigated and discussed the possible constitutional violations with the petitioner, and has raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *See* Tenn. Sup. Ct. R. 28, app. C; *Leslie*, 36 S.W.3d at 38.

Here, the petitioner was represented by post-conviction counsel, had the opportunity to present witnesses, and had the opportunity to cross-examine any state witness. While it appears from the record that post-conviction counsel did not file an amended petition or notice that an amended petition would not be filed, or file the certification of counsel, the petitioner filed a comprehensive pro se petition and was given ample opportunity during the hearing to raise other issues. All due process requires in a post-conviction proceeding is that the petitioner have "the opportunity to be heard at a meaningful time and in a meaningful manner." *See State v. Stokes*, 146 S.W.3d 56, 61 (Tenn. 2004). While counsel may not have been as proficient as the petitioner desired, there is no indication that the petitioner's viable claims were not addressed at the hearing. Accordingly, the petitioner is not entitled to relief on this issue.

Third, the petitioner alleges that neither post-conviction counsel nor the post-conviction court inquired into the voluntariness of his plea. We have thoroughly reviewed the transcript, and we note that while it appears that post-conviction counsel did not specifically address the voluntariness of the plea during his questioning, the state thoroughly questioned the petitioner about his plea. In fact, it was during the state's questioning that the petitioner expressed his belief that he pled guilty "out of fear." Moreover, appointed counsel was questioned regarding the circumstances of the

petitioner's plea. In addition, the transcript of the guilty plea hearing was included in the post-conviction court's file. Thus, the voluntariness of the petitioner's plea was addressed at the hearing, and the petitioner is not entitled to relief on this issue.

Fourth, the petitioner asserts that the deficient representation of retained counsel was not thoroughly addressed during the post-conviction hearing. On the contrary, the record indicates that retained counsel's involvement was discussed during the hearing. The record reflects that every person that testified at the hearing related information regarding retained counsel's involvement or non-involvement in the case. Also, a tape from the petitioner's parole hearing in which retained counsel indicated that he was representing the petitioner in the HTO matter was admitted into evidence. Although the petitioner argues that additional information indicating that retained counsel was representing him should have been addressed, in light of the above proof and the petitioner's testimony that he thought retained counsel was representing him, any failure to have documents or letters of the same effect introduced did not deprive the petitioner of his right to a fair hearing. Accordingly, the petitioner is not entitled to relief on this issue.

Fifth, the petitioner argues that he did not have a full and fair hearing because the court abruptly ended the proceedings. The transcript of the post-conviction hearing shows that the petitioner called his wife, his aunt, and appointed counsel as witnesses, and he also testified. Then, the state called the prosecutor, after which, the petitioner testified again. It was after this second round of testimony that the state said, "Your Honor, we have some witnesses that want to be heard," and the court declined.

The petitioner asserts that he was unable to present further testimony and proof regarding his claims due to the court ending the proceedings. While we are unsure why the court declined to entertain any further state witnesses, we have no reason to conclude from the record that the petitioner was denied his right to a full and fair hearing. As mentioned earlier, the petitioner had already called three witnesses, as well as testified himself twice. We have found at least three instances in the transcript of the post-conviction hearing where the petitioner was given the blanket opportunity to respond to a question along the lines of, "Is there anything that you feel like . . . we need to cover?" As a result, the petitioner failed to prove that he was denied a full and fair hearing and is not entitled to relief on this issue.

Ineffective Assistance and Guilty Plea

The petitioner next argues that he received the ineffective assistance of counsel, which caused him to enter an unknowing and involuntary plea. In denying the petitioner relief, the post-conviction court made the following findings:

> 1. According to the testimony at the hearing of this matter, the Petitioner had two attorneys, [retained counsel] and [appointed counsel], advising him about this case.

> 2. The Court first finds that [appointed counsel] was not prepared to try [the case] on June 2, 2003. While there may have been some confusion as to who was going to represent the Petitioner at trial, the attorney of record, [appointed counsel], should have been prepared to try the Petitioner's case on June 2nd. However, this point became moot when the jury for the other case set that day was picked. The [Petitioner] knew at that time that his case would be tried on another day.
>
> 3. The Court finds that, prior to June 2, 2003, [appointed counsel] advised the Petitioner of his remedy for waiving his preliminary hearing due to the informal "agreement" the Petitioner claimed he had with the District Attorney, motions that could be filed, and the likelihood of success at trial, and he advised the Petitioner of his rights before he entered his plea on that day.
>
> Additionally, the Court finds that the Petitioner is very familiar with the workings of the judicial system, knew his rights, and knowingly, voluntarily, and intelligently entered into a plea agreement in this case on June 2, 2003.
>
> For the foregoing reasons the Court finds that the Petitioner received effective assistance of counsel and that his plea was voluntarily, intelligently, and knowingly made. . . .

When a claim of ineffective assistance of counsel is made under the Sixth Amendment, the petitioner bears the burden of proving (1) that counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). This standard has also been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. *See Strickland*, 466 U.S. at 687. Our supreme court described the standard of review for ineffective assistance of counsel as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697). When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

When reviewing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the state standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing by the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea; namely, that the defendant has been made aware of the significant consequences of such a plea. *Mackey*, 553 S.W.2d at 340; *see Pettus*, 986 S.W.2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904. In determining whether a plea is "voluntary" and "knowing," the court must consider:

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship, 858 S.W.2d at 904 (citations omitted).

Upon review, we note the petitioner has failed to prove that any deficiency on either counsel's part caused him prejudice, i.e., that he would have insisted upon going to trial but for the alleged deficiency. Moreover, the petitioner has not met his burden of proving that his plea was other than knowing and voluntary. The record reveals that when the post-conviction court questioned the petitioner about whether he wanted a trial, he responded, "[n]o. I want the original plea agreement that they offered me. If I have to take a new trial, I guess that is what I will do." The record further reveals that the petitioner faced a greater sentence than the sentence he received. Also, the record reflects that the petitioner was familiar with criminal proceedings, having six prior convictions. Lastly, the transcript of the guilty plea hearing reveals that the petitioner voluntarily and knowingly pled guilty. The following is an excerpt from the petitioner's plea hearing:

> The Court: Mr. Pendergraph, do you understand what you are charged with and what the State would have to prove in order to convict you of either or both of these offenses?
>
> [The Petitioner]: Yes, sir.

The Court: Have you talked with [appointed counsel] . . . about what proof the State would likely put on against you about the officer and about the [breathalyzer] test and all that?

[The Petitioner]: Yes.

The Court: Do you understand what the minimum and maximum sentences are if you are convicted of either of these offenses?

[The Petitioner]: Yes, sir.

The Court: Do you understand that this conviction can and probably will be used against you in the future if you are ever convicted of anything [else] to make your time run longer?

[The Petitioner]: Yes, sir.

The Court: You understand you still have the right to plead not guilty, the right to a jury trial, the right to confront and cross examine witnesses that testify against you, the right to subpoena your own witnesses to trial to testify for you if there are any, the right not to testify in your own behalf at your trial, and the right to have an attorney present with you at each stage of the proceedings. Do you understand you still have all those rights?

[The Petitioner]: Yes.

. . . .

The Court: Is your plea of guilty freely and voluntarily made?

[The Petitioner]: Yes, sir.

The Court: Has anyone promised you anything other than this agreement or threatened you in any way to get you to plead guilty?

[The Petitioner]: No, sir.

The Court: Are you sure? You were a little hesitant about that.

[The Petitioner]: Yes, sir. I'm positive.

The Court: Are you satisfied with [appointed counsel's] representation of you in this matter?

[The Petitioner]: Yes, sir.

Although the petitioner claims that he pled guilty out of fear, because his counsel was unprepared to go to trial, the record reflects that the petitioner knew his case was not going to be tried on June 2, 2003, ensuring that his counsel would have time to prepare for trial. Accordingly, we conclude the petitioner has failed to prove his allegations by clear and convincing evidence.

Plea Agreement

The petitioner lastly argues that the state improperly breached the terms of its initial plea agreement. The petitioner avers that the prosecutor originally offered him a plea agreement in which he would receive a three year sentence, suspended after six months, in exchange for waiving his preliminary hearing.

At the meeting where the alleged offer was made, four people were present: the petitioner, the petitioner's wife, appointed counsel, and the prosecutor. Appointed counsel testified that he did not consider what was said to be a firm offer because offers were not generally made at the General Sessions level. Appointed counsel said that it was more of a "what [we] generally offer on this type of case" conversation. The prosecutor testified that the district attorney's office generally did not make offers at the General Sessions level for felony cases. The prosecutor explained that he would not have known what to offer at that point because he would not have known the petitioner's offender status. The petitioner's wife testified that she could not remember anything that was said during the meeting. The petitioner, alone, asserted that he received an offer of three years, suspended after six months.

Even though the petitioner claims he received this offer and claims that other defendants received a similar offer, such assertions do not prove the state made this offer to the petitioner. With the wealth of testimony at the post-conviction hearing indicating that a firm offer was not made, the petitioner has failed to prove this allegation by clear and convincing evidence. Therefore, the petitioner is not entitled to relief on this issue.

CONCLUSION

Having thoroughly reviewed the record and the parties' briefs, we conclude that the petitioner is not entitled to relief on any of the issues raised. Accordingly, we affirm the judgment of the post-conviction court denying the petitioner's request for post-conviction relief.

_____

J.C. McLIN, JUDGE